SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Proceedings Appealed From	2
Statute Involved	2
The Complaint	5
The Evidence at the Trial	7
The People's Case	7
The Defendant's Case	8
Argument:	
I—Conduct that casts contempt upon the American flag is not protected by the First Amendment guarantee of freedom of speech	10
II—The statutory exception which permits certain uses of the flag in a non-contemptuous manner and disconnected from advertisement does not deny appellant equal protection	15
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Adderley v. Florida, 385 U. S. 39 (1966)	11
Cox v. Louisiana, 379 U. S. (1965)	11
Halter v. Nebraska, 205 U. S. 34 (1907)	11, 15,16
Hoffman v. United States, 256 A.2d 567 (Ct. of App., D.C. 1969)	12
People v. Cogwill, 78 Cal. Rptr. 853 (Cal. App. 1969), *app. dism.* —— U. S. —— (1970)	12, 13

PAGE

People v. Finkelstein, 9 N.Y.2d 342 (1962) 15
People v. Radich, 26 N.Y.2d 114 (1970) 12
People v. Street, 20 N.Y.2d 231 (1967), *rev'd.* 394 U. S. 576 (1969) 12

Roth v. United States, 354 U. S. 476 (1957) 14

Schacht v. United States, —— U. S. —— (1970) 13
Smith v. California, 361 U. S. 147 (1959) 15
State v. Schlueter, 23 A.2d 249 (N.J. 1941) 12
Street v. New York, 394 U. S. 576 (1969) 13
Stromberg v. California, 283 U. S. 359 (1931) 13

Tinker v. Des Moines, 393 U. S. 503 (1969) 13

United States v. O'Brien, 391 U. S. 367 (1968) 11, 13

West Virginia v. Barnette, 319 U. S. 624 (1943) 14
Winters v. New York, 333 U. S. 507 (1948) 14

Statutes and Constitution

N.Y. Former Penal Law §1425 ..... 2-5, 7, 15-16
N.Y. General Business Law §136 2
U.S. Constitution, First Amendment 11

IN THE

Supreme Court of the United States

October Term, 1969

No. 1589

STEPHEN RADICH,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court, the appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is in accord with controlling constitutional principles.

Proceedings Appealed From

Radich appeals from an order of the Court of Appeals of New York entered February 18, 1970 affirming, with an opinion, two judges dissenting (26 N.Y.2d 114), an order of the Appellate Term, First Judicial Department, of the Supreme Court of the State of New York, entered June 13, 1968 unanimously affirming, without an opinion (57 Misc. 2d 1082), a judgment of the Criminal Court of the City of New York, New York County, rendered May 5, 1967 convicting Radich, after a trial before three judges, one judge dissenting (53 Misc. 2d 717), of Malicious Injury to and Destruction of Property (former N. Y. Penal Law §1425 (16)(d), presently N. Y. General Business Law §136) and sentencing him to a fine of $500 or in lieu thereof 60 days' imprisonment.

Statute Involved

Section 1425, subdivision 16, of the former New York Penal Law* provides (emphasis added):

> 16. Any person, who
>
> a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or

* Now §136, par. d of the New York General Business Law.

otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word figure, mark, picture, design or drawing or any advertisement of any nature, or

b. Shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, shield or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance on which so placed, or

c. Shall print, engrave, or otherwise place or cause to be printed, engraved or otherwise placed on any blank check, bill head, letter head, envelope or other business stationery, a representation of any such flag, standard, color, shield or ensign, or shall use any such blank check, bill head, letter head, envelope or other stationery for business purposes or correspondence, or

d. *Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon* either *by* words or *act*, or

e. Shall raffle or place in pawn any such flag, standard, color, shield or ensign, or

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America, or

g. Shall publicly use or cause any such flag, standard, color, shield or ensign, to be publicly used as a receptacle for the placing, depositing or collecting of money or any other article or thing,

Shall be guilty of a misdemeanor; * * *

The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

The possession by any person, other than a public officer, as such, of any such flag, standard, color, shield or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section shall be presumptive evidence that the same is in violation of this section, and was made, done or created after the first day of

September, nineteen hundred and five, and that such flag, standard, color, shield, ensign, or article, substance, or thing, did not exist on the first day of September, nineteen hundred and five.

The Complaint*

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 7, *County of* New York

State of New York)
County of New York) *ss.*:

Patrolman John P. Burns, *of No.* 19 Precinct, *County of* New York, *City of New York, being duly sworn, deposes and says that on* December 27, 1966 at about 8:30 a.m. and December 28, 1966 *at about* 5:30 p.m. *at* on second floor at 818 Madison Avenue *in the County of* New York *State of New York, the defendant,* STEPHEN RADICH *did commit the crime of*: did violate section 1425 of the New York State Penal Law, subdivision 16-Paragraph d & f, in that any person who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon the flag, standard, shield or ensign, of the United States of America, either by words or act or shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America:

under the following circumstances:

your deponent states that at the above location, the Radich Gallery, on December 27, 1966 at 8:30 a.m., he observed

* Italicized portion identifies the printed portion of the complaint form.

that the defendant did have on display, in a large window, facing the public sidewalk, the flag of the United States of America, in the form of a body hanging from a yellow noose. Deponent further states that on December 28, 1966 at about 5:30 p.m., at the above mentioned location, the defendant did have on public display and for public viewing, the flag of the United States of America, in the following manner; 1—in the form of a male sexual organ, protruding from the body of form, in the anterior portion of the body of the form and depicting the erected male penis, protruding from a form of a cross. 2—the flag of the United States of America, wrapped in a chained bundle. 3—the standard of the United States on the form of an alleged elephant. 4—The Union of the flag of the United States of America, depicted in the form of an octupus. 5—the American flag attached to a gas meter. 6—The American flag wrapped around a bundle attached to a two wheeled vehicle. 7—The American flag in the form of a body, hanging from a yellow noose. Your deponent further states that the defendant is the owner and operator of the premises mentioned above.

Wherefore deponent prays that the defendant be dealt with according to law.

Sworn to before me
January 4, 1967

(signed) Ptl. John P. Burns

(signed) Walter J. Bayer
Judge, Criminal Court
of the City of New York

THE EVIDENCE AT THE TRIAL

The People's Case

Patrolman **John P. Burns** of the New York City Police Department testified that on December 27, 1966, at 8:30 a.m., while on duty, he was outside the premises 818 Madison Avenue (8-9).* He observed in the second story window of the building what appeared to be the flag of the United States, formed in the shape of a human body, suspended by a yellow noose (9, 18).

The following day, December 28, 1966, at 5:00 p.m., he returned to 818 Madison Avenue, accompanied by Patrolman Myrich of the Police Department's Photo Unit (9). They entered an art gallery located on the second floor. The gallery was open to the public, free of charge (17). Within the gallery, he saw twelve or thirteen exhibits on display (18). Nearby, he saw the defendant engaged in conversation with an unknown female (10). When asked by the officer, the defendant identified himself as Stephen Radich, proprietor of the gallery (10). Thereupon, Patrolman Burns served the defendant with a summons for a violation of Section 1425 of the Penal Law (10).

When questioned, the defendant said that he was not the person who created the works exhibited in the gallery; however, he received a commission for their sale (10, 33-4).

Each of the objects in which the American flag appeared was photographed (19). These photographs were received in evidence as People's Exhibits 1 through 9 (11-16).

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* References are to the state Record on Appeal, to page numbers which appear at the foot of each page.

The Defendant's Case

Stephen Radich, the defendant, testified that he is the sole proprietor of an art gallery located at 818 Madison Avenue; he owned the gallery for seven years (70-1, 90). On December 27th and 28th, 1966, he exhibited, in his gallery, thirteen works by Marc Morrel (73). The gallery was open to the public, there was no admission charge, and brochures were sent out to publicize the exhibit (73-4, 90-1; Defendant's Exh. B).

All of Morrel's works were for sale. There was a set price list and Morrel's works ranged in price from $250 to $1200. By an arrangement with Morrel Radich's commission for a sale was thirty-three and one-third per cent (77, 81, 91). He sold one work for $900 and accordingly received a commission of $300 (91).

Radich considered Morrel's work to be protest art (79). In his opinion, the works protested war; destruction; certain societies; injustices in this country; and infringement upon the freedom of speech (79-80). During the exhibit "war protest songs" were played on a tape recorder (76-7). In exhibiting Morrel's works, he did not intend to be contemptuous of the flag of the United States (80). He "displayed them because they were works of art, and because [like] all other works of art in the gallery they were for sale" (101-2).

One of Morrel's works [People's Exhibits 3 and 4] was a cross from which protruded the American flag, formed in the likeness of a human penis; tassels at the base of the cross were "probably a decorative or pubic hair" (92-5).

Church flags were draped over the cross's horizontal and vertical pieces. In the defendant's opinion, the message imparted by this sculpture was that there is no separation of church and state; that this government is involved in aggressive acts of war (96). The church flags indicated that the organized church either supports, leads or is being led by acts of aggression (96). The work was priced at $1200, but was not sold (96-7). In his view, the artist was not being disrespectful toward the flag; he thought Morrel questioned the behavior of the government and organized religion in aggressive acts of war (98).

Another of Morrel's works, which hung in his gallery's window, was made up of an American flag in the form of a body, suspended by a hangman's noose [People's Exhibit 2]. In the defendant's opinion, this sculpture illustrated Morrel's doubt whether the people of the United States are enjoying their constitutional rights (99, 101).

Hilton Kramer, art news editor of the *New York Times*, qualified as an expert witness after recounting his background in the field of art (107, 112). In his opinion, "there is virtually no material which contemporary artists are not applying in some form or other * * * in a work of art" (112-3). He "would define a work of visual art as any physical object specifically whose visual properties [are] specifically designed to communicate an aesthetic emotion" (113); and "anything specifically designed to be a work of art, whether it's poor or high quality, is a work of art" (124).

In the course of his newspaper responsibilities, Kramer received an announcement [Defendant's Exh. B] of the

Morrel exhibit at the Radich Gallery, and in December 1966 he saw the exhibit at the gallery (108, 113). In accord with his definition of art he considered Morrel's works art, and a "rather feeble" form of protest art (118-19, 123); he also described Morrel's works as "ornamental sculpture" (122). Though he was aware that Morrel intended to render some anti-war message, no political message was conveyed to him (125-8).

ARGUMENT

I

Conduct that casts contempt upon the American flag is not protected by the First Amendment guarantee of freedom of speech.

Appellant Stephen Radich was convicted for committing an act by which he defiled and cast contempt upon the American flag; he was not convicted for any verbal expression against the government or the flag, or for any expression of opposition to the government or its policies which his act may be deemed to have conveyed.

For Radich chose to exhibit publicly in his art gallery certain so-called sculptures which employed the American flag in a contemptuous manner: One sculpture used the American flag to depict a male penis and attached the penis to a cross draped with church flags; another sculpture, which was in the window of the gallery and visible from the street, used the flag to depict a human body hanging by the neck from a noose.

While Radich considered these items to be protest art, Radich himself had not constructed the items and was not

himself apparently seeking to communicate social protest by these works; his interest appeared primarily commercial: to exhibit what he considered art for the purpose of sale, his commission being one-third the selling price. And, while the art news editor of the *New York Times* considered the items protest art, the items conveyed no political message to him.

In any event, the First Amendment does not accord a nonverbal act which seeks to express an idea, as many or most acts do, the same protection afforded a verbal expression of an idea. *Cox* v. *Louisiana,* 379 U.S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The First Amendment protects "speech" and "the press"; an actual flag in the form of a male sexual organ, or a hanging effigy, is neither "speech" nor "the press."

Consequently, since, as we shall demonstrate, a "sufficiently important governmental interest" and power exists in prohibiting *conduct* contemptuous of the flag and since "the governmental interest is unrelated to the suppression of free expression," then—even if the conduct included expressive elements—"incidental limitations" on the latter were justified. *United States* v. *O'Brien, supra,* at 376-7.

That there exists a "sufficiently important governmental interest" and power in prohibiting conduct which treats the American flag contemptuously, was made evident by this Court in *Halter* v. *Nebraska,* 205 U.S. 34, 41-2 (1907):

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been

> adopted as symbols of the power and history of the peoples who bore them * * * *Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.*
>
> "* * * Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it" (emphasis added).

In short, as the New York Court of Appeals held, the flag desecration statute promotes the important governmental interest of preventing "the outbreak of * * * violence by discouraging contemptuous and insulting treatment of the flag in public." *People* v. *Radich,* 26 N.Y.2d 114, 119 (1970); *People* v. *Street,* 20 N.Y.2d 231, 236 (1967), *rev'd. on other gds.* 394 U.S. 576 (1969); *see also, People* v. *Cogwill,* 78 Cal. Rptr. 853 (Cal. App. 1969), *app. dism.* —— U.S. —— (1970); *Hoffman* v. *United States,* 256 A.2d 567 (Ct. of App., D.C. 1969); *State* v. *Schlueter,* 23 A.2d 249 (N.J. 1941). That no actual violence may occur in a particular case, such as the present one, is a fortuitous circumstance that hardly negates the proposition that contemptuous use of the flag in public can be the occasion for violence and that the state can proscribe conduct that potentially breeds violence without waiting until the violence is actually occasioned. Radich had exhibited in his window, for the public to view, an actual American flag being hung in effigy. The state, seeking to avoid violence by prohibiting conduct contemptuous of the flag, did not have to wait until members of the public broke Radich's window or destroyed his studio and possibly in the process injured him or innocent bystanders.

It is equally clear that the governmental purpose envisioned by the statute is "unrelated to the suppression of free expression." Acts contemptuous of the flag regardless of whether they are designed to express views are punishable [*see, e.g. People* v. *Cogwill, supra*], just as destruction of draft cards regardless of whether the destruction was "engaged in for the purpose of expressing views" is punishable. *United States* v. *O'Brien, supra,* at 375. The instant statute is neutral as to political expression—a disappointed "hawk" expressing by similar uses of the flag his contempt for American appeasement of "communism" would also be covered by the statute. Similarly, the criminal complaint in this case, and the People's evidence, made no mention of expression or political views; only conduct was referred to. The "expressive" qualities alleged were brought by appellant as a matter of defense. *Compare Street* v. *New York,* 394 U.S. 576 (1969). And, while acts contemptuous of the flag are justifiably prohibited, the citizen remains free verbally "to express publicly [his] opinions about our flag [or the draft], including those opinions which are defiant or contemptuous." *Street* v. *New York, supra,* at 593. Accordingly, the instant statute is distinguishable from those statutes or administrative regulations whose object was either to suppress communication [*Stromberg* v. *California,* 283 U.S. 359 (1931) (prohibiting people from expressing their opposition to government by the display of a red flag); *Tinker* v. *Des Moines,* 393 U.S. 503 (1969) (prohibiting students from expressing their opposition to the Vietnam war by the wearing of black arm bands); *Schacht* v. *United States,* —— U.S. —— (1970) (prohibiting people from "speaking out against the role of our Army and our country in Vietnam")] or to "com-

pel'' an individual ''to utter what is not in his mind.'' *West Virginia* v. *Barnette,* 319 U.S. 624, 634 (1943) (compulsory flag salute).

Further, that the statute prohibiting defilement and casting contempt upon the flag is not unconstitutionally vague, and that the exhibited works fall within the statutory proscriptions, cannot be doubted. A criminal statute is not void for vagueness if ''men of common intelligence'' are not ''required to guess at the meaning of the enactment.'' *Winters* v. *New York,* 333 U.S. 507, 515 (1948). Fair, reasonable notice of the acts proscribed in terms readily understandable by men of average intelligence is required, not mathematical precision. Indeed, this Court

> ''has consistently held that lack of precision is not itself offensive to the requirements of due process. The Constitution does not require impossible standards, all that is required is that the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. * * * That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.'' *Roth* v. *United States,* 354 U.S. 476, 491-2 (1957).

Thus, men of ordinary intelligence would be able to understand what conduct ''casts contempt'' upon the American flag. And if using the flag for purposes of advertisement on a bottle of beer ''tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor'' [*Halter* v. *Nebraska,*

supra, at 42], certainly, hanging the flag in effigy and using it to form a male penis cast contempt upon the flag. And no man of common intelligence could think otherwise. The knowing display of such objects need not be excused because the exhibitor's specific intent is other than contemptuous. The statute is properly malum prohibitum; the defendant is held to the natural consequences of his deliberate knowing act of exhibiting items whose subject he was aware of and which were found contemptuous of the flag. In *Smith* v. *California,* 361 U.S. 147 (1959), upon which appellant relies, the state was prohibiting from punishing a proprietor of a bookstore for exhibiting items whose subject matter he was unaware of. If the bookseller had been aware of the contents of the items, his subjective opinion that they were not obscene would have been immaterial. Moreover, the scienter requirement of *Smith*—liberally applied in New York to books and other products of the "press" [*People* v. *Finkelstein,* 9 N.Y.2d 342 (1962)]—has no application to conduct.

II

The statutory exception which permits certain uses of the flag in a non-contemptuous manner and disconnected from advertisement does not deny appellant equal protection.

Finally, Radich claims that the statute denies him equal protection, based on his erroneous reading of an exception contained in the statute:

> "This subdivision shall not apply to any act expressly permitted by the statutes of the United States

> of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for private use in correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement."

Radich attempts to argue that this provision of the statute permits people to use the flag contemptuously on "ornamental pictures * * * or newspaper, or periodical" and thus denies him equal protection when it forbids him to use the flag contemptuously on ornamental sculpture. Read in the context of the entire statute, the major portion of which seeks to prohibit the use of the flag in advertisements, it is quite clear that the exception is intended to permit only non-contemptuous use of the flag for certain purposes, when such use is "disconnected and apart from any advertisement." Indeed, this Court in *Halter* v. *Nebraska, supra,* interpreted the exception as not applying to contemptuous use:

> "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be 'disconnected from any advertisement.' All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to

arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws'' [*id.* at 45].

Since Radich has been convicted of using the flag contemptuously, the exemption provision is not here in issue.

Thus, appellant's argument as to equal protection not only fails to present a substantial federal question, but it it based on a construction of the statute which has not been announced by the New York courts. There is no authority that non-contemptuous use of the flag in ornamental art, in the form of ''sculpture,'' would not be protected by the exemption for ''ornamental pictures.'' In the absence of such authority, the issue sought to be raised here is not properly presented for review.

Conclusion

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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June, 1970